SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term, 1968

NO. 1286

ROBERT P. NEES, *Petitioner*

v.

R. E. CULBERTSON, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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NO._____

ROBERT P. NEES, *Petitioner*

v.

R. E. CULBERTSON, Sheriff, Jefferson County, Texas, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Robert P. Nees, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on January 28, 1969. (Rehearing denied below March 24).

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at 402 S.W.2d 186. It is appended as Appendix C hereto.

The memorandum opinion of the Federal District Court is reported at 260 F. Supp. 791, and is appended as Appendix D hereto.

The opinion of the Circuit Court of Appeals is unreported and is appended as Appendix E hereto.

JURISDICTION

The judgment of the Court of Appeals was dated and entered January 28, 1969. Rehearing was denied March 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether an indictment charging a particular criminal transaction, to-wit; misapplication of public funds in the sum of $312.35 on or about July 31, 1959 provides accused with adequate due process notice that he will actually be tried for misapplication of "any sum of money" over a designated 3-year period of time.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules which this case involves are:

Amendment VI and Amendment XIV of the Constitution of the United States;

Art. 95, Vernon's Annotated Penal Code of Texas; Art. 396, Section 6, now Art. 21.02, Section 6, Vernon's Ann. Code of Criminal Procedure of Texas.

Their pertinent text is set forth in Appendix G.

STATEMENT OF THE CASE

The petitioner, Robert P. Nees, was indicted and convicted for fraudulent misapplication of public funds in violation of Article 95, Vernon's Annotated Penal Code. Specifically, the indictment charged that Nees, on or about July 31, 1959, did fraudulently take and convert to his own use $312.35 belonging to Jefferson County, Texas, which had come into his possession while acting as deputy sheriff of that county (R. 92, 93). He was tried on a plea of not guilty and the Court admitted into evidence, over objection, check stubs, cash receipts, bank deposits, cancelled checks and monthly reports from the financial records of the sheriff of Jefferson County, Texas, covering the months of December, 1958 through December, 1959 (R. 94), "not for the limited purposes to show motive, intent and design, but for all purposes", (R. 44). Other evidence was testimony of a fellow employee to the effect that Nees had admitted taking funds in the amount of $15,000, over a period of a number of years; the county auditor's reports, and a confession of guilt obtained from Nees, (R. 94). Nees offered uncontroverted testimony that he was not at work July 30, 31 and August 1 or 2 of the year 1959; he denied that he had taken the sum of $312.35 on the 31st day of July, 1959, (R. 45). The Court charged the jury by instructing them that the date "on or about July 31, 1959, in the indictment," *meant any date or dates between November 28, 1958 and November 27, 1961,* and that the State was not under the burden of establishing that the specific sum of $312.35, as alleged in the indictment, was unlawfully converted," *it being on the contrary, sufficient under the law if the State has established . . . that any sum of money* was unlawfully and fraudulently taken. . . ." (Appendix B).

Nees was found guilty by the jury and sentenced to 4 years imprisonment. His conviction was affirmed by the Texas Court of Criminal Appeals (Appendix C).

Nees petitioned of the Federal District Court for Writ of Habeas Corpus, claiming that the charging allegations of the indictment varied from the proven facts and thus failed to give him notice of the accusations against him. Nees' petition was denied by the District Court, *Nees v. Culbertson,* E.D. Tex. 1966, 260 F. Supp. 791, from which judgment he appealed to the District Court of Appeals. The Circuit Court of Appeals affirmed denial of the Writ, with Chief Judge Brown dissenting. (Appendix E).

REASONS FOR GRANTING THE WRIT

1. The conflict in the Circuit Court of Appeals: the opinions of Judges Goldberg and Wisdom, Circuit Judges, speaking for the majority, and Chief Judge Brown, dissenting. (Appendix E and R. 92-114).

2. The conflict between the right of an accused in Texas to be notified within reasonable limits of the time an offense is charged to have been committed and the general propositions recognized by Federal Law (R. 110), the Texas Code (R. 110) and Texas Case Law (R. 96, that "on or about" may encompass an act committed prior to the indictment but within the period of the statute of limitations."

In this connection, petitioner would also direct the attention of the Court to 42 C.J.S. 1277, Section 257, under title, *Judgment and Information:*" The general rule is substantially as set out in the preceding paragraph and

cases from 35 states are cited as following. However, the Federal Rules and many of the State Rules provide the accused with protection by way of bills of particulars, and restriction to exact or nearly exact dates when alibi is pleaded as a defense. This is not true in Texas when actual notice is imputed to the accused as a matter of law, if Article 21.02 (formerly Art. 396), is followed in laying the indictment.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted..

Respectfully submitted,

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Counsel for Petitioner

By: Michael D. Matheny
Of Counsel

CERTIFICATE OF SERVICE

A copy of this petition for writ of certiorari has been served upon Crawford C. Martin, Attorney General of Texas, and W. C. Lindsey, District Attorney of Jefferson County, Texas, Counsel for Respondent, by mailing a true copy thereof to each of them.

Michael D. Matheny
MICHAEL D. MATHENY

APPENDIX A

INDICTMENT IN THE CRIMINAL DISTRICT COURT OF JEFFERSON COUNTY, TEXAS

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS duly selected, organized, empaneled and sworn as such for the County of Jefferson, State of Texas, at the July-December Term, A.D. 1961, of the District Court for the 136th Judicial District of Texas in said County and State, upon their oaths present in and to said Court that on or about the 31st day of July, 1959, and anterior to the presentment of this indictment in the County of Jefferson and State of Texas, Robert P. Nees was a deputy sheriff of Jefferson County, Texas, and as such officer, by virtue of said office, there had come into, and was then in his custody and possession, the sum of $312.35 in money, the same being then and there the property of the said Jefferson County, and the said Robert P. Nees did then and there unlawfully and fraudulently take and convert the same to his own use, against the peace and dignity of the State.

/s/ T. E. Gregory
Foreman of the Grand Jury

APPENDIX B

THE CHARGE OF THE COURT IN THE CRIMINAL DISTRICT COURT OF JEFFERSON COUNTY, TEXAS

THE STATE OF TEXAS VS. ROBERT P. NEES

LADIES AND GENTLEMEN OF THE JURY:

The Defendant stands charged by indictment with the offense of fraudulently taking and converting to his own use the sum of $312.35 in money belonging to Jefferson County, Texas, which said money had theretofore come into and was then and there in the possession of the Defendant by virtue of his office as deputy sheriff of Jefferson County, Texas, said offense is alleged to have been committed in Jefferson County, Texas on or about the 31st day of July, 1959 and anterior to the presentment of said indictment.

To this charge in the indictment the Defendant has pleaded not guilty, and I give you the following as the law applicable to this case by which you will be guided in arriving at your verdict:

I.

You are instructed that the State is not bound to rely on the 31st day of July, 1959, as being the date on which the offense was committed, but the allegation in the indictment alleging that said offense was committed on or about July 31, 1959, as applied to this case, means any date or dates between November 28, 1958 and November 27, 1961.

II.

You are instructed, as a part of the law in this case, that if an officer of any county shall fraudulently take, misapply or convert to his own use any money belonging to such county that may have come into his custody or possession by virtue of his office, he shall be punished by confinement in the penitentiary for not less than two (2) nor more than ten (10) years.

III.

You are instructed that as a part of the law of this case the State is not under the burden of establishing that the specific sum of $312.35, as alleged in the indictment, was unlawfully and fraudulently taken by the Defendant and converted to his own use, it being, on the contrary, sufficient under the law if the State has established, from the evidence, beyond a reasonable doubt, that any sum of money was unlawfully and fraudulently taken by the Defendant and converted to his own use on or about the 31st day of July, 1959, as the term "on or about said date", as applied to this case, is construed as hereinabove set forth.

IV.

Now, bearing in mind the foregoing instructions, if you find and believe from the evidence in this case, beyond a reasonable doubt, that on or about the 31st day of July, 1959, *as the phrase "on or about said date" is hereinabove construed,* the Defendant, Robert P. Nees, was a duly appointed and acting deputy sheriff of Jefferson County, Texas, as alleged in the indictment, and that he did on or about said date, *as the phrase "on or about*

said date" is hereinabove construed, in Jefferson County, Texas, as alleged in the indictment, fraudulently take, misapply and convert to his own use all or any part of said $312.35 in money, as alleged in the indictment, *as you are hereinabove instructed with respect to said amount;* and if you further find and believe from the evidence beyond a reasonable doubt that said money so taken, misapplied and converted by the Defendant if any money was so taken, misapplied and converted, belonged to Jefferson County, Texas, and had theretofore come into and was then and there in the custody and possession of said Robert P. Nees by virtue of said office as deputy sheriff and that as such deputy sheriff it was his duty and obligation to collect and receive said money, then you will find him guilty of fraudulently taking, misapplying and converting to his own use said money, and assess his punishment at confinement in the penitentiary for any term of years not less than two nor more than ten.

If you have a reasonable doubt as to any of the matters hereinabove set out then you will give the Defendant the benefit of the doubt and find him not guilty.

V.

You are instructed that before you can convict the Defendant in this case you must find and believe from the evidence, beyond a reasonable doubt, that on or about the date alleged in the indictment the Defendant did in Jefferson County, Texas, fraudulently take, misapply and convert to his own use all or some part of said $312.35 in money alleged in the indictment *as you are hereinabove instructed with respect to said amount* and that said money so taken, misapplied and converted, if it was, belonged to Jefferson County, Texas, and had theretofore come into

and was in the custody and possession of the Defendant by virtue of his office as deputy sheriff of Jefferson County, Texas, and if you have a reasonable doubt as to any of these matters you will find the Defendant not guilty.

V.

The Defendant in this case has filed an affidavit in which he alleges among other things that he has never been convicted of a felony in this or any other State.

In this connection you are instructed that our statutes provide that where a person is charged with the offense of fraudulent misapplication of county funds and the Jury find him guilty and assesses his punishment at imprisonment in the penitentiary for any term not exceeding five (5) years, and they further find that the Defendant has never been convicted of a felony in this State or in any other State, the Jury may cause the sentence to be suspended during the good behavior of the Defendant.

Now, if you find the Defendant guilty of fraudulent misapplication of county funds and the punishment assessed by you is for not more than five (5) years, and you further find that he has never been convicted of a felony in this State or in any other State, you may, in your discretion, cause the sentence to be suspended during the good behavior of the Defendant, and in case you desire to suspend the sentence of this Defendant let your verdict show that you find the Defendant has never been convicted of a felony in this State or in any other State, and further show that you recommend the suspension of the sentence.

You are instructed that you are not to consider the bill of indictment returned against the Defendant as any evidence or circumstance of Defendant's guilt.

In all criminal cases the burden of proof is on the State.

The defendant is presumed to be innocent until his guilt is established by legal evidence, beyond a reasonable doubt; and in case you have a reasonable doubt as to the Defendant's guilt you will acquit him and say by your verdict "not guilty".

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

s/ GEORGE D. TAYLOR
Judge Presiding

APPENDIX C

OPINION OF THE COURT OF CRIMINAL APPEALS OF TEXAS

ROBERT P. NEES, APPELLANT
No. 38,912 VS. APPEAL from JEFFERSON COUNTY
THE STATE OF TEXAS, APPELLEE

The conviction is for the misapplication of county funds in violation of Art. 95, V.A.P.C.; the punishment, four years.

It is charged that the appellant on or about July 31, 1959, while deputy sheriff of Jefferson County, Texas, did fraudulently take and convert to his own use $312.35 belonging to Jefferson County which had come into his possession as such officer. The indictment was returned on November 28, 1961.

The proof shows and it undisputed that the appellant was the duly appointed, qualified, and acting deputy sheriff of Jefferson County at the time here in question. The appellant as such officer was assigned the duties of chief clerk of the sheriff's office. These duties were to receive and to account for all funds paid to the sheriff's office in payment of fines, judgments, tax sales, and other matters for which funds were collected, and to issue receipts for cash, checks, and all funds, and to deposit, disburse, and make a monthly report.

J. M. Gowling, deputy district clerk, testified that he was employed as chief clerk in the sheriff's office from 1941 to 1947, when he went to work in the auditor's office, where he continued working until 1961 when he was employed in the office of the district clerk. The ap-

pellant began working as chief clerk in the sheriff's office in 1947, and continued in such position until January 4, 1961. During the period from 1947 to 1961, Gowling and the appellant had discussed the duties of the chief clerk of the sheriff's office. On January 4, 1961, Gowling went to appellant's office and asked for a particular check stub. At this time the following occurred:

"Q. At that time, what, if anything, did Mr. Nees tell you?
"A. He asked me to take a walk across the street with him.
* * *
"A. He said he had something he wanted to tell me.
"Q. You are talking about Bob Nees, Robert P. Nees, the Defendant in this case?
"A. Yes, sir.
* * *
"A. He said he was short in his funds.
* * *
"A. I asked him what he meant by "being short, he said, "I am . . . I mean I am short in my accounts in the office."
* * *
"A. He said, "Somewhere in the neighborhood of fifteen thousand or more."
"Q. Now, was that fifteen thousand dollars?
"A. Yes, sir.
"Q. What, if anything, did you do or say then?
"A. I asked him what he meant by it, he said, "Well, I just mean I am short in my funds." And I said, "Well, Bob, do you know what this means?" And he said, "Yes, I do."
* * *
"A. He said, "What?" I said, "We are going to have to go and talk to Charlie."
"Q. Now, when you say "go and talk to Charlie,"

who did you mean by Charlie, who were you referring to?

"A. The Sheriff, Charlie Meyer.

* * *

"A. I told Bob to tell Charlie what he told me.

"Q. Did he tell him?

"A. He did.

"Q. And were you present while he talked to him?

"A. Yes, sir.

"Q. All right. Was that on or about the 4th of January, 1961?

"A. Yes, sir.

"Q. Now, at the time that you were talking to Mr. Nees when he first told you about this was he under arrest or charged with anything, or . . .

"A. No, sir."

Between 4 and 5 p.m., January 4, 1961, Deputy Sheriff Moon and the appellant went to the office of Pat Hayes, an investigator for the district attorney's office, where the appellant after having been warned by Hayes in accordance with the statute in effect in 1961, made and signed a written statement pertaining to the shortage of funds and it reads in part as follows:

"My name is R. P. Nees, I am 54 years of age and I live * * * in Beaumont, Texas. In May of 1947 I went to work for Sheriff C. H. Meyer, as a deputy sheriff in Jefferson County and have worked since that time as the office deputy.

"As the office deputy I am the only person who receives money paid into the sheriff's office for fines, from people who have been fined in the courts, and fees from civil papers served. I account for the money received by the sheriff's office and I disburse this money in the various

places it goes into different offices of the county. When I am not in the office fines are paid to other people in the office, but this money is turned over to me and I am the one who disburses it.

"Sometime in 1952 or 1953 I was in a financial strain because of an illness in my family. I began taking money out of the sheriff's office funds that were in my possession as office deputy. I continued to take money that I knew belonged to Jefferson County and use for my own personal use and was hoping that I would be able to put it back after I sold some property that I inherited. I inherited this property three or four years after I started taking office money. After I sold the property I did put some of the money back, but not all of it. I have continued to take for my own personal use the money received by me in the Sheriff's Office up through last month. Since I began taking money out of the office up to the present time I would estimate that I have taken between sixteen and eighteen thousand dollars.

"I have to make a monthly report to the auditor's office and I would use the money collected during a current month to make up the shortage on the last months report. I did not report fees that I had collected, or show them on my reports, to build up a surplus to cover the monthly reports.

"No other person in the Sheriff's Office, or in the county offices, is responsible in any way for this shortage. I am the only person involved and no one else knew what I was doing. I knew at the time I took this money that it was the property of Jefferson County and no one gave me permission to take or use any of the money received by me as office deputy for my own use and benefit."

After a hearing in the absence of the jury on the issue of the voluntary nature of appellant's written statement, the trial court held that it was voluntarily made and was not as a matter of law inadmissible. No objection was made on the ground that the statement was not voluntary. The objections to it were that he did not have an attorney with him at the time and he was not taken before a magistrate before the statement was made.

The evidence reveals that the Port Arthur Independent School District issued its check dated July 10, 1959, in the sum of $312.35, payable to the sheriff of Jefferson County for a cost bill covering several tax suits; that no receipt was issued for this check and there was no accounting for the check in any of his monthly reports of disbursements; that the school district did not receive any further bill or demands for payment of the matters covered by this check; that said check according to the deposit slips were deposited and returned to and paid by the drawee bank of the school district. The total receipts issued for the month of July, 1959, were $4,372.69, while the total deposited was $2,786.22. The total deposit in the bank for July, 1959, should have been $4,685.04. The testimony reveals a deposit July 30, 1959, of a check in the amount of $312.35 which was not shown on the receipts. The check for $312.35 is not shown in the monthly report of July, 1959, and the audit of the records of that office until December 5, 1961, does not account for the check other than its deposit and the check stub.

Auditor Nelson of the county auditor's office testified in part as follows:

> "Q. Now, in the light of what you have testified to and based upon your experience as an accountant and your familiarity with the procedures in the

Sheriff's office in accounting for these funds I will ask you what check number 29221 in the amount of $312.35 which was deposited in the account in July of 1959 but for which no receipt was issued, what does that mean?

"A. That means that an amount of $312.35 in cash would be available to the person in charge. Simple arithmetic would show that he would not have to account for the $312.35 if he had not recorded it in his books.

"Q. Mr. Nelson, as a matter of fact, does your audit show that at least the amount of $312.35 (counsel walks toward blackboard) during the month of July, 1959, was never accounted for?

"A. That is true."

It appears from the testimony that all of the cash received in said office need not be deposited in the bank when checks are deposited for which no receipts have been issued, and then the one making the deposit would not have to account for an amount of cash equal to the checks for which no receipts were issued.

Proof was offered of several other checks received in said office for which no receipts were issued, and said checks were deposited in the bank. These checks were handled in the same or similar manner as the check for $312.35.

Testifying in his own behalf, the appellant denied being in his office on July 30, through August 3, 1959, because of certain events occurring in his family, and denied converting the $312.35 on July 31, 1959; and his absence from the office was supported by the testimony of his wife.

The appellant testified that he voluntarily made statements to Gowling, the sheriff, and Hayes of a shortage

in his account in the sum of $16,000 to $18,000, that this money was converted by him to his own personal use, and that he had been anxious to clear the matter up and confess it; that the shortages were created by him taking money from the office which belonged to the county; that he took some money out of said office during the year 1959, but could not remember any specific amount on any certain date and he did not know how much. On further cross-examination the appellant was asked and answered as follows:

"Q. Then you know you took some money during the year 1959?
"A. I am sure I did."

The appellant contends that he was denied due process of law because he was not warned of his right to counsel prior to his making the written statement; that he was not taken before a magistrate before he made the statement; that he was not advised of his right to remain silent prior to the making of said statement; and that the state failed to prove that the statement was voluntarily given by him.

The state's proof shows and the appellant admitted while testifying that he voluntarily initiated and first revealed the shortage which he had wanted to clear up and confess; that he explained the shortage but was unable to be specific because he could not recall the details; that the statements to the officers were voluntarily made; that he was taken before a magistrate at the time the complaint was filed, waived an examining trial, and during this time he never requested counsel; and that in a short time an attorney appeared, made his bond, and according to the record has continued to represent him. The appellant appeared before the justice of the peace about 5:30 p.m.

January 4, bond was set, and he was released on bond at 7:50 p.m. the same day. The contentions presented do not reveal error.

It is insisted that the trial court erred in admitting in evidence extraneous offenses not charged in the indictment which surprised and misled him; and again erred in charging the jury that if they found beyond a reasonable doubt that he fraudulently converted any sum of money to his own use on any date or dates between November 28, 1958, and November 27, 1961, to find him guilty; that these dates surprised and misled the appellant because they were so different from the date alleged in the indictment.

The indictment was returned on November 28, 1961, alleging that the appellant on or about the 31st day of July, 1959, converted certain county funds. A complaint had been filed against the appellant on January 4, 1961, charging him with the commission of said offense and he was discharged as deputy sheriff that day.

The method and procedure which the appellant employed to take and convert to his own use cash and checks coming into his possession as such officer was circumstantially shown. There was no direct evidence of any specific taking and conversion on any definite date. Although the appellant admitted the shortage, he stated that he was unable to specifically recall the taking of any particular sum on a certain date. The show, the method, scheme and design of the ultimate conversion of county funds, the evidence of other and similar transactions were admissible. Mayse v. State, 242 S.W.2d 371.

The state is not bound by the date on or about which the offense is alleged to have been committed and a con-

viction may be had upon proof that the offense was committed at any time prior to the return of the indictment which is within the period of limitations. The limitation period applicable to the offense here charged is three years anterior to the presentment of the indictment. 5 Branch (2) 313, Sec. 2806; 21 Tex. Jur. (2) 674, Sec. 81; Ellis v. State, 318 S.W.2d 655.

The charge authorizing a conviction if the jury found beyond a reasonable doubt that appellant misapplied and converted to his own use all or any part of the $312.35 in money followed the provisions of Art. 95, P.S., prohibiting the unlawful conversion of any money belonging to a county. Bone v. State, 391 S.W.2d 415.

Appellant contends that he was denied due process of law by the charge to the jury which materially varied from the indictment alleging the fraudulent conversion of $312.35 on or about July 31, 1959, and the court's instruction to the jury that if they found beyond a reasonable doubt that he fraudulently converted to his own use any sum of money on any date or dates between November 28, 1953, and November 27, 1961, to find him guilty.

The indictment was returned on November 28, 1961, alleging the commission of the offense on or about July 31, 1959. The application of the three year statute of limitation anterior to the return of said indictment would include November 28, 1958.

In applying the law to the facts in submitting the case to the jury, the court gave effect to the "on or about" allegation in the indictment; and in connection therewith applied the law of reasonable doubt. Further, the court charged the jury on the converse of the state's application which was as follows:

"You are instructed that before you can convict the Defendant in this case you must find and believe from the evidence, beyond a reasonable doubt, that on or about the date alleged in the indictment the Defendant did in Jefferson County, Texas, fraudulently take, misapply and convert to his own use all or some part of said $312.35 in money alleged in the indictment as you are hereinabove instructed with respect to said amount and that said money so taken, misapplied and converted, if it was, belonged to Jefferson County, Texas, and had therefore come into and was in the custody and possession of the Defendant by virtue of his office as deputy sheriff of Jefferson County, Texas, and if you have a reasonable doubt as to any of these matters you will find the Defendant not guilty."

There was no denial of due process of law by the court's charge as the appellant contends.

The evidence is sufficient to support the conviction and no error appearing, the judgment is affirmed.

Belcher, Judge

(Delivered March 16, 1966)

Opinion approved by the Court

APPENDIX D

NEES VS. CULBERTSON, 260 F. Supp. 791

MEMORANDUM OPINION OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, FISHER, J.

Petitioner filed for Writ of Habeas Corpus, and by agreement an oral hearing was not held. Counsel for Petitioner and the State have stipulated that the certified record of the Court of Criminal Appeals of Texas in Cause No. 38912, styled *Robert P. Nees v. The State of Texas,* 402 S.W.2d 186 (Tex. Ct. Crim. App. 1966) shall be deemed to be introduced as the entire evidence submitted in connection with this cause.

On December 4, 1964, Petitioner on a plea of not guilty was convicted by a jury of violation of Article 95, Vernon's Annotated Penal Code[1] and assessed a punishment of four years in the penitentiary. Appeal was taken to the Court of Criminal Appeals of Texas where the judgment was affirmed and a motion for rehearing was denied.

The issues raised in the Petition for Writ of Habeas Corpus are the same as those raised on appeal before the

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1. Art. 95 MISAPPLICATION OF COUNTY OR CITY FUNDS. "If any officer of any county, city or town, or any person employed by such officer shall fraudulently take, misapply, or convert to his own use any money, property or other thing of value belonging to such county, city or town, that may have come into his custody or possession by virtue of his office or employment or shall secret (SIC) the same with intent to take, misapply or convert it to his own use, or shall pay or deliver the same to any person knowing that he is not entitled to receive it, he shall be confined in the penitentiary not less than two nor more than ten years."

State Court, and as to such issues, therefore, State remedies have been sufficiently exhausted and a Federal Court may grant an application for habeas corpus.[2]

Petitioner asserts that his detention is unlawful and in violation of his Federal constitutional rights as follows:

First, that he was denied due process of law, a fair trial and effective right of counsel, in that he was not fully informed of the nature and cause of the charges against him in advance of trial, in that he was charged in the indictment with taking a sum certain of money on a specific date and the state, over his objections, was permitted to introduce evidence of deficiencies in his account over a period of a year. Also over the objection of Petitioner, the trial court instructed the jury that if they found beyond a reasonable doubt that the Petitioner unlawfully converted any sum of money from November 28, 1958 (the date the statute of limitations tolled the time), through November 27, 1961 (the date the grand jury returned the indictment), they would find the defendant guilty. Further, that the approval of the Court of Criminal Appeals of this procedure and interpretation of Article 396, Section 6 of the Code of Criminal Procedure of Texas, 1952,[3] resulted in the defendant-petitioner having no notice of the nature and cause of the accusation against him and denied him effective counsel in that counsel did not know the type of proof he would be required to refute.

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2. *Brown v. Allen*, 344 U.S. 443 (1953).

3. This the same statute now contained in Art. 21.02, Requisite 6, of the Texas Code of Criminal Procedure of 1965, ART. 21.02 (396) (451) (439) REQUISITES OF AN INDICTMENT "An indictment shall be deemed sufficient if it has the following requisites: 6. The time mentioned must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation."

As his second ground, Petitioner states that he was denied due process of law by the introduction of a confession into evidence which statement was taken without having been advised of his right to counsel prior to the taking of the confession.

In regard to the first ground, I find the facts correctly stated by the Texas Court of Criminal Appeals:

> "The proof shows and it is undisputed that the Petitioner was duly appointed, qualified, and acting deputy sheriff of Jefferson County at the time here in question (S.F. 18-20) The Petitioner as such officer was assigned the duties of chief clerk of the sheriff's office (S.F. 387). These duties were to receive and to account for *ALL* funds paid to the sheriff's office in payment of fines, judgments, tax sales, and other matters for which funds were collected, and to issue receipts for cash, checks, and *ALL* funds, and to deposit, disburse and make a monthly report. (S.F. 70-72, 387, 388) (Emphasis added). 402 S.W.2d 186, 187.
>
> "The evidence reveals that the Port Arthur Independent School District issued its check dated July 10, 1959, in the sum of $312.35, payable to the Sheriff of Jefferson County for a cost bill covering several tax suits (S.F. 36); that no receipt was issued for this check, and there was no accounting for the check in any of the petitioner's monthly reports of disbursements (S.F. 205); that the school district did not receive any further bill or demands for payments of the matter covered by this check (S.F. 44); that the said check according to the deposit slips was deposited and returned to and paid by the drawee bank of the school district (S.F. 38). The total receipts issued for the month of July, 1959, were $4,372.69, while the total deposited was $2,-786.22. The total deposit in the bank for July 1959

> should have been $4,685.04. (S.F. 179). The testimony reveals a deposit July 30, 1959 of a check in the amount of $312.35 which was not shown on the receipts (S.F. 178). The check for $312.35 is not shown in the monthly report of July 1959, and the audit of the records of that office until December 5, 1961, does not account for the check other than its deposit and the check stub." 402 S.W.2d, 186, 188, 189 (Citations to the Statement of Facts added)

Rather than resting their case at this point, the State elected to go further and introduce the records of Petitioner for the months of December 1958 through December 1959 (excluding July 1959), as its exhibits Nos. 20-30, all of which showed discrepancies on the part of the Petitioner. These were "not offered for the limited purpose to show motive, intent and design, but for all purposes" (S.F. 290), and were so accepted. It is upon this acceptance that the Petitioner bases part of his first ground of exception. This evidence is admissible under the widely accepted evidentiary rule that evidence is admissible if it tends directly or fairly to prove defendant's guilt of the crime charged, or to connect him with it or tends to establish a scheme, plan, or system, *Tandberg-Hanssen,* 284 F.2d 331, 333 (10th Cir. 1960; *Jenks v. United States,* 226 F.2d 540, 548 (5th Cir. 1955) rev'd on other grounds, 353 U.S. 657 (1957).

As to the matter of relevancy, this is an evidentiary question which the Supreme Court has held to be a matter within the realm of state courts, *Odell v. United States,* 251 F.2d 704 (10th Cir. 1958); *Lisenba v. California,* 314 U.S. 219 (1941), and is therefore not reviewable here on a Petition for Habeas Corpus.

As to the trial court charging the jury to consider as the date of conversion any date or day between November 28, 1958 and November 27, 1961, no authority is cited by Petitioner for the proposition that this is a denial of counsel and therefore a violation of his constitutional right reviewable by this court in a habeas corpus proceeding; nor has the court been able to find such authority. Suffice it to say that the instruction and interpretation of Article 396, Section 6, of the Code of Criminal Procedure of Texas 1925, "An indictment shall be deemed sufficient if it has the following requisites: 6. The time mentioned must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation," seems to be the same as that pronounced in the Federal cases, *Winslett v. United States,* 124 F.2d 302 (5th Cir. 1942); *Alexander v. U.S.,* 271 F.2d 140 (8th Cir. 1959); *U.S. v. Krepper,* 159 F.2d 958 (3rd Cir. 1946), cert. denied, 330 U.S. 824 (1947).

Although not raised in his petition for habeas corpus, Petitioner raises the question in his trial brief of the possibility of a fatal variance existing between the indictment, evidence and the charge of the trial court. The admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving Federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protection that a federal question is presented. *Grundler v. State of North Carolina,* 283 F.2d 798, 801 (4th Cir. 1960); *United States ex rel Sliva v. Commonwealth of Pennsylvania,* 196 F. Supp. 51 (1961); *Davis v. State of North Carolina,* 196 F. Supp. 488 (1961), rev'd on other grounds, 310 F.2d 904 (4th Cir. 1962); *Hammil v. Tinsley,* 202 F.

Supp. 76, 79 (1962); *United States v. Ragen,* 231 F.2d 312 (7th Cir. 1956); *Morales v. Wilkinson,* 283 F.2d 252 (5th Cir. 1960); *Rhay v. Browder,* 342 F.2d 345 (9th Cir. 1965). I do not find such circumstances in this case, nor do I find that there is a material variance such as to affect the petitioner's constitutional rights. *Berger v. United States,* 295 U.S. 78, 82 (1935); *Wong Tai v. United States,* 273 U.S. 77 (1927).

Petitioner contends as to his second ground a violation of due process and right to counsel in "the action of the State Court in admitting into evidence at his trial a so-called 'confession' or a statement taken by a special investigator of the district attorney's office of Jefferson County, Texas, at a time when the applicant had not been warned of his right to counsel prior to the taking of such statement, said interrogation being at all times in the "accusatory' state of such interrogation."

The statement of facts indicate and the court so finds that on January 4, 1961, a J. M. Gowling went to the petitioner's office and asked for a record of a particular check stub (S.F. 56); that the Petitioner asked Gowling to walk across the street with him as he had something he wanted to tell Gowling (S.F. 57); that Petitioner told Gowling that he (Petitioner) was short in his office accounts somewhere in the neighborhood of Fifteen Thousand Dollars (S.F. 62, 409); that this was reported to the Sheriff; that somewhere between 4:00 P.M. and 5:00 P.M. (S.F. 150) January 4, 1961, Deputy Sheriff Moon took Petitioner to the Office of Pat Hayes, that while in the office Petitioner was warned by Hayes of the effect of any statement he might make and that he did not have to make any statement (S.F. 105, 131) and a complaint was drawn up against the Petitioner (S.F. 131); that

while in the office the Petitioner made some type of preliminary statement to the investigator (S.F. 132); that thereafter at approximately 5:30 P.M., January 4, 1961, the Petitioner was arraigned and voluntarily waived an examining trial before Justice of the Peace Wallace McCasland (S.F. 112); and bond was set; that thereafter Petitioner went back to the investigator's office and after again being advised of his rights made the statement which was admitted at the trial in which he admitted shortages of Sixteen to Eighteen Thousand Dollars (S.F. 134). I further find that the Petitioner was most cooperative with the investigators throughout this proceeding (S.F. 134, 378, 414); that the Petitioner never asked for or was denied an attorney (S.F. 134, 157); that the Petitioner had been working in the sheriff's office as a deputy full time for some fourteen years and was fully aware of his constitutional rights (S.F. 375); that Petitioner, Moon and Hayes were good friends and the investigators would have certainly obtained an attorney for him had he requested one (S.F. 138); that no coersion of any type, promise of benefit or reward or other inducement was used to obtain the confession of the petitioner; and that it was completely voluntary (S.F. 134, 474); and that petitioner was released to his attorney on bond at 7:50 P.M. January 4, 1961 (S.F. 140).

The trial of this case began on December 1, 1964 (Tr. 1). This was some six months after the decision in *Escobedo v. Illinois,* 378 U.S. 478 (June 22, 1964), but over a year prior to the decision of *Miranda v. Arizona,* 384 U.S. 436 (June 13, 1966). Therefore, the guidelines established in *Escobedo* as to the admissibility of the confession will be applied. *Johnson v. New Jersey,* 384 U.S. 719 (1966). It is certainly true that the proceedings

had narrowed to the accusatory stage at the time the statements were taken. *Escobedo,* supra. However, the Petitioner admits that the statement was freely and voluntarily given (S.F. 414); that he cooperated with the investigators; that they did not mistreat him (S.F. 414); that he was very anxious to get the whole thing off his chest (S.F. 409), *Stein v. New York,* 346 U.S. 156, 200 (1953); Frankfurter J., dissenting; that he was taken before a magistrate within an hour and a half; and as I mentioned previously the interrogators were personal friends of the accused who would have certainly allowed him to see counsel had he requested one.

It must be remembered that petitioner had been a deputy sheriff for fourteen years and was aware of the effect of any statements that he would make. The trial court held a separate hearing outside of the hearing of the jury and determined that the confession was voluntary (S.F. 112, 152), *Jackson v. Denno,* 378 U.S. 368 (1964). I therefore find that the Petitioner made his statements or confessions freely, voluntarily and with a full understanding of his rights in the matter and with a full understanding of the consequences of such statements.

The trial and appellate state court records show conclusively that Petitioner was not denied due process of law in the respects claimed and his application for Habeas Corpus is Denied.

ENTERED this 31st day of November, 1966.

s/ Joe J. Fisher
UNITED STATES DISTRICT JUDGE

JUDGMENT OF THE COURT

(Number and title omitted) (Filed: Dec. 3, 1966)

On this the 21st day of November, 1966, came on for hearing this cause. Petitioner was represented herein by counsels of his own choice. Mr. Herbert Oldham and Mr. Phillips Bordazes, attorneys of this Court, and Respondent was represented by Mr. Charles B. Swanner, Assistant Attorney General of Texas. Both parties announced ready for trial whereupon it was stipulated and agreed by and between counsels for Petitioner and counsel for Respondent that the certified record of the Court of Criminal Appeals of Texas in Cause No. 38,912, styled *Robert P. Nees v. State of Texas,* 402 S.W.2d 186 (Tex. Ct. Crim. App. 1966), shall be deemed to be the entire evidence submitted in this cause and that counsel for both parties would submit their respective positions and arguments to the Court by Briefs.

After the Court had read all the evidence, considered the pleadings and briefs of counsel, the Court concluded that the Petition for Writ of Habeas Corpus should be denied for the reasons set out in the Memorandum Opinion filed in this cause; and therefore,

It is ORDERED, ADJUDGED and DECREED that the Petition for Habeas Corpus be and the same is hereby in all things denied and Petitioner is remanded to the custody of Respondent.

It is further ORDERED, ADJUDGED and DECREED that all costs of this proceeding be taxed against Petitioner for which let execution issue.

This shall constitute a final Judgment in this cause and the Clerk shall file this Judgment and send a copy to counsel for the parties.

Done at Beaumont, Texas, this 3rd day of December, 1966.

s/ Joe J. Fisher
UNITED STATES DISTRICT JUDGE

APPENDIX E

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 24400

ROBERT P. NEES, Appellant,
versus
R. E. CULBERTSON, Sheriff, Jefferson County, Texas, Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(January 28, 1969)

Before BROWN, Chief Judge, and WISDOM and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge: The appellant, Robert P. Nees, was indicted and convicted for fraudulent misapplication of public funds in violation of Article 95, Vernon's Annotated Penal Code.[1] Specifically, the indictment charged that Nees on or about July 31, 1959, did fraudulently take and convert to his own use $312.35 belonging to Jefferson County, Texas, which had come into his posses-

1. "Art. 95. MISAPPLICATION OF COUNTY OR CITY FUNDS: If any officer of any county, city or town, or any person employed by such officer, shall fraudulently take, misapply, or convert to his own use any money, property or other thing of value belonging to such county, city or town, that may have come into his custody or possession by virtue of his office or employment or shall secret (sic) the same with intent to take, misapply or convert it to his own use, or shall pay or deliver the same to any person knowing that he is not entitled to receive it, he shall be confined in the penitentiary not less than two or more than ten years."

sion while acting as deputy sheriff of that County. He was tried on a plea of not guilty, was found guilty of the offense charged in the indictment, and was sentenced to four years imprisonment. His conviction was affirmed by the Texas Court of Criminal Appeals. Nees v. State, Tex. Crim. App. 1966, 402 S.W.2d 186.

Nees petitioned the Federal District Court for writ of habeas corpus claiming two errors, namely, (1) that the charging allegations of the indictment varied from the proven facts and thus failed to give him notice of the accusations against him, and (2) that he was denied the assistance of counsel at the time he made an inculpatory statement to an investigator, which statement was admitted into evidence. Nees' petition was denied by the District Court, Nees v. Culbertson, E.D. Tex. 1966, 260 F. Supp. 791, from which judgment he now appeals. We affirm the denial of the writ.

The status and duties of Nees at the time in question were never in dispute. He was the duly appointed deputy sheriff of Jefferson County, who functions were to receive and to account for all funds paid to the sheriff's office for fines, judgments, tax sales, and other matters. His accounting procedures included the issuance of receipts for deposits and disbursements and the compiling of a monthly report.

The prosecution advanced and the court admitted the following evidence to prove that Nees had misused his position as deputy sheriff: (1) check stubs, cash receipts, bank deposits, cancelled checks, and monthly reports from the financial records of the Sheriff of Jefferson County, Texas, covering the months of November, 1958, to November, 1961; (2) the testimony of a fellow employee to the effect that Nees had admitted taking funds in the

amount of $15,000.00; (3) the county auditor's report, and (4) a confession of guilt obtained from Nees.

I.

We first focus our inquiry on the nexus of the indictment, evidence, and jury charge. Although the indictment charged only a specific crime, i.e., the unlawful taking and conversion of $312.35, evidence was introduced over Nees' objections concerning defalcations of fifteen thousand dollars over a three-year period. The crux of Nees' argument, both at the trial and on this appeal, is that this divergence between the words of the indictment and the evidence presented at trial constituted undue surprise, contrary to the due process clause of the fourteenth amendment.

Nees acknowledges that his conviction was obtained in compliance with traditional Texas criminal practice. Indeed, the indictment was drawn precisely in accordance with Article 21.02 of the Texas Code of Criminal Procedure (formerly Article 396) which reads in relevant part:

> An indictment shall be deemed sufficient if it has the following requisites:
>
> . . .
>
> 6. The time mentioned must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation.
>
> 7. The offense must be set forth in plain and intelligible words.
>
> . . ."

Moreover, Texas courts have sanctioned the introduction of germane evidence despite certain variances from the charge as to the time and nature of crime—even when that extra evidence itself leads to the conviction. In Mayse v. State, 1951, 156 Tex. Cr. R. 360, 242 S.W.2d 371, a case directly in point, the defendant was accused of embezzling funds belonging to the city which had come into his possession by virtue of his office as city secretary. The Texas Court of Criminal Appeals held that a conviction could be sustained regardless of whether the state proved embezzlement of the exact sum specified in the indictment. The following statement by the Court is applicable here:

> "The indictment charged the embezzlement by the appellant of $5,154.03.
>
> The state was not, however, under the burden of establishing that such sum was embezzled. To the contrary, the conviction was authorized by a showing of the conversion of any sum of money." 242 S.W.2d at 372.

See also Ellis v. State, 1958, 167 Tex. Cr. R. 88, 318 S.W.2d 655, where the same court reversed a defendant's conviction for misappropriation of public funds because he had been acquitted two years earlier on the same indictment. The court applied the following doctrine in denying the State's claim that it was relying on different transactions in the two cases:

> "The general rule is that the state is not bound by the allegation of 'on or about' in an indictment as to the date of the commission of the offense, but may rely upon any date within the period of limitation. 23 Tex. Jur. 648, Sec. 41; Vidaurri v. State, 155 Tex. Cr. R. 17, 230 S.W.2d 147." 318 S.W.2d at 656.

Numerous other reaffirmations of this general rule include Granton v. State, Tex. Crim. App. 1967, 415 S.W.2d 664; Ex Parte G. C. Martin, Tex. Crim. App. 1964, 374 S.W.2d 438; Rogers v. State, 1960, 169 Tex. Cr. R. 239, 333 S.W.2d 383, 384.

Nees acknowledges the above authority and does not contend that he was treated in any unique manner under the present Texas law. Indeed, he seeks to overturn that law whose nebulous tolerances he claims deny him the basic right to know the specific boundaries of the State's charge.

The State's reply is two-fold. First, it contends that the evidence was not extraneous, but rather was essential to demonstrate the methodical fraud perpetrated by Nees. The State points out that the crime of embezzlement springs from a position of trust, and rarely, if ever, will the actor resort to open misappropriation. The nature of the crime, then, requires balance-sheet computations, not only to establish the misappropriation of a specific sum of money, but also to present to a jury outward manifestations of the accused's inner conscience.

The first contention categorizes the problem as one of evidence and not one of indictment sufficiency. It finds basis in the fact that the State did prove the conversion of a $312.35 check, and the jury did convict Nees of the misappropriation of some or all of the $312.35. The jury's verdict was rendered in accordance with one of the trial court's instructions which read as follows:

> "You are instructed that *before you can convict the Defendant* in this case you must find and believe from the evidence, beyond a reasonable doubt, that on or about the date alleged in the indictment the

> Defendant did in Jefferson County, Texas, fraudulently take, misapply and convert to his own use *all or some part of said $312.35 in money alleged in the indictment* as you are hereinabove instructed with respect to said amount and that said money so taken, misapplied and converted, if it was, belonged to Jefferson County, Texas, and had therefore come into and was in the custody and possession of the Defendant by virtue of his office as deputy sheriff of Jefferson County, Texas, and if you have a reasonable doubt as to any of these matters you will find the Defendant not guilty." (Emphasis added):

The verdict itself stated:

> "We, the jury, find the defendant guilty of fraudulent misapplication of county funds *as charged in the indictment,* and assess his punishment at confinement in the penitentiary for a term of Four (4) years." (Emphasis added.)

Viewed from the above facts, Nees' complaint becomes one merely of over-proof rather than one of undercharging. Nees' burden of showing injustice is thus increased, because state evidentiary procedures are generally not subjected to microscopic examination by the federal courts. In *Libenba v. California,* 1941, 314 U.S. 219, 228-29, 62 S.Ct. 280, 86 L.Ed. 166, 176, the Supreme Court refused to review the admissibility of what the defendant had claimed to be irrelevant and unduly shocking experience. The Court stated as its underlying rationale: "We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence." This proposition was recently reaffirmed in *Burgett v. Texas,* 1967, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319. Even though the Court in that case rejected the evi-

dentiary admissibility of a prior conviction obtained when the defendant had been denied the assistance of counsel, it was careful to state:

> "We do not sit as court of criminal appeals to review state cases. The states are free to provide such procedures as they choose, including rules of evidence, provided that none of them infringes a guarantee in the Federal Constitution." 19 L.Ed.2d at 324.

Our Court, through its general supervisory power over federal courts rather than through its constitutional supervision of state courts, has had occasion to comment on an evidentiary issue similar to the one at bar. In *Weiss v. United States,* 5 Cir. 1941, 120 F.2d 472, 474-475, we affirmed a conviction for mail fraud despite the trial court's admission into evidence of fraudulent transactions which had not been specifically alleged in the indictment. Judge Holmes' scholarly opinion in denying the defendant's petition for rehearing is relevant to our case.

> "Let us consider the theory upon which such evidence is admissible. The general rule is that evidence of another crime unconnected with the one on trial is inadmissible, but this rule is subject to a number of exceptions, the first of which is that evidence of other offenses by the accused is admissible to show his criminal intent as to the offense charged, where the other offenses are similar to and not too remote from that charged, and where intent is in issue as an element of the offense charged. Another exception is where the evidence of a separate crime tends to explain, illustrate, or characterize the act charged when such act is capable of more than one construction. Another is to rebut a claim of mistake or inadvertence. An exception also applies where the crime

> charged is one of a series of swindles or other crimes involving a fraudulent intent, or where the crime charged is part of a plan or system of criminal action. It is clearly admissible in prosecutions for obtaining money by false pretenses. The length of time over which an inquiry as to other offenses may extend is within the sound discretion of the trial court." 122 F.2d 675, 682 cert. den., 314 U.S. 687, 62 S.Ct. 300, 86 L.Ed. 550.

The *Weiss* analysis was quoted by our Court eighteen years later in *Ahrens v. United States,* 5 Cir. 1959, 265 F.2d 514, 516. It has been cited with approval in many cases, including *Hurst v. United States, Cir.* 1967, 370 F.2d 161, 166, where we affirmed a conviction for conspiracy to violate various sections of the Internal Revenue Code, despite the admission of testimony concerning a related criminal act which had taken place about ten months before the earliest accusatorial date in the indictment. See also *United States v. Kirkpatrick,* 6 Cir. 1966, 361 F.2d 866, 868 and *United States v. Coleman,* N.D. Miss. 1966, 259 F. Supp. 394, 396, aff'd, 5 Cir. 1967, 383 F.2d 989, which acknowledge and follow *Weiss,* and, for a similar statement of law, *Jencks v. United States,* 5 Cir. 1955, 226 F.2d 540, 550, rev'd on other grounds, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103.

The above authority demonstrates that, if reviewed solely as an evidentiary challenge, Nees' petition for habeas corpus relief must fail. Our Court's refusal to grant relief under its federal supervisory power shows, *a fortiori,* that we cannot justify relief from state convictions through the more limited powers granted in habeas corpus.

The State's attempt to limit the issue as one of evidence is weakened, however, by another of the trial court's

instructions to the jury, which did seem to expand the nature of Nees' crime from that alleged in the indictment:

> "You are instructed that, as a part of the law of this case, the State is not under the burden of establishing that the specific sum of $312.35, as alleged in the indictment, was unlawfully and fraudulently taken by the Defendant and converted to his own use, it being, on the contrary sufficient under the law if the State has established, from the evidence, beyond a reasonable doubt, that *any sum of money* was unlawfully and fraudulently taken by the Defendant and converted to his own use on or about the 31st day of July, 1959, as the term 'on or about said date,' as applied to this case, is construed as thereinabove set forth. (set forth as *any time* from November 28, 1958—the date the statute of limitations tolled the time—through November 27, 1961—the date the grand jury returned the indictment)." (Emphasis added.)

To be sure, the existence of such a charge may not necessitate a change in the nature of our consideration from those described previously. In fact, we question whether the above charge had any effect because the trial court, as we have quoted previously, also charged the jury that they could convict Nees only if they believed beyond a reasonable doubt that he did "fraudulently take, misapply and convert to his own use all or some part of said $312.35 in money alleged in the indictment." Since Article 95 under which Nees was convicted lists no monetary minimum or degrees of the offense, it could be argued that the trial court's restriction renders its broad charge meaningless. Moreover, the jury's verdict did limit itself to "fraudulent misapplication of county funds as charged in

the indictment." Nevertheless, because the broad statement of the Texas law was given to the jury, we will consider whether such statement adversely affected Nees' constitutional right to have fair notice of the charges against him.

The State's second contention meets squarely this problem of fair notice. The State argues that, if Texas law clearly allows some variance between an indictment and proof of guilt, defendants cannot be misled by such practice where they are represented by competent counsel.[2] It adds that, for the same reasons that evidence of a continuing fraud was relevant, proof of such fraud could not have surprised Nees. Specifically, because proof of a solitary fraudulent misapplication would have been impossible absent an unlikely eye witness, the necessity of admitting some form of running account analysis was self-evident.

Although we do not reject the possibility of unfairness within the Texas procedure, our review in habeas corpus must be limited to the rights of Nees and to the fairness of his particular trial. It is not the function of this Court to search for an achilles' heel in every state criminal proceeding. Rather our aim is to relieve particular defendants who have suffered from constitutional deprivations. We deem any variance between Nees' indictment, proof, and charge as constitutionally harmless or immaterial if the following two factors can be shown: (a) The indictment gave Nees actual knowledge of the character of his accusation so that he is not misled while preparing his defense; and (b) Nees will be able to advance these proceedings as a defense to further prosecution for the same misappro-

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2. The defendant has never alleged that his counsel was inadequate.

priations.[3] Our analysis of these two factors and of the applicable law reveals that Nees' trial was constitutionally sound.

(a) *Surprise.* Although awareness is a relative concept and not easily calibrated in all instances, it would be a mockery of reality to say that Nees was surprised by the evidence presented at his trial. The indictment did not necessitate a safari into darkness; the target was fraudulent misappropriation and it had specificity. The State did prove a $312.35 misappropriation, and the nature of the crime renders it inconceivable that Nees was caught off-guard by evidence of more extensive but related treasury raiding. The only positive proof of Nees' crime was a showing of a deficit, and this required a beginning and ending period of accountability. The composite figure could not be the indictable one because it was merely an arbitrary measure of kaleidoscopic elements. But the necessity of the composite rendered probable if not inevitable a description of the kinetics within.[4]

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3. The true inquiry, therefore, is not whether there has been a variance of proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. (cases cited), *"Berger v. United States,* 1935, 295 U.S. 78, 82, 55 S.Ct. 629, 79 L.Ed. 1314, 1318. Several later cases have adopted the Berger rationale, including *Russell v. United States,* 1962, 369 U.S. 749, 763, 82 S.Ct. 1038, 82 L.Ed.2d 240, 250-51; *Grissette v. United States,* 5 Cir. 1963, 313 F.2d 187, 188; *United States v. Mills,* 6 Cir. 1966, 366 F.2d 512, 514.

4. We deem it significant, though not conclusively so, that although Nees' counsel objected when evidence of other misappropriations was admitted, he never moved for a continuance.

In 1961 our Court denied relief (under 28 U.S.C.A. §2255) from a federal conviction despite the defendant's claim that he was misled by (1) a mistake as to the statutory reference in his indictment and (2) insufficient detail in the indictment concerning the crime alleged. Judge Brown's words in that case teach us to seek out real instead of fictional injustices:

> "When properly analyzed the allegations made by appellant misinterpret the scope of review in a §2255 proceeding. This is not a direct appeal from the judgment or reduce the sentence to a valid statu- the judgment or reduce the sentence to a valid statutory maximum, much in the nature of a habeas corpus proceeding. Cf. *Brinson v. Wilkinson,* 5 Cir. 1959, 271 F.2d 790, 791. The reviewing court may reverse or set aside the conviction only if it finds that the petitioner was denied some basic fundamental right. Mere error in the trial or handling of the case leading to conviction is not sufficient. Section 2255 has application only when the judgment is void or subject to collateral attack (cases cited).
>
> "Viewed in this light appellant's claim as to the erroneous statutory reference in the indictment is disposed of easily. Appellant was represented by counsel and the indictment adequately and positively alleged facts constituting a crime under §2113 (a) though it erroneously referred to subsection (b). Under these circumstances it is highly doubtful that he was misled at all, but even if he were, his proper remedy was by appropriate motion or appeal from the original judgment. The defect, if any, is not such as to render the judgment subject to collateral attack.
>
> . . .

> "As the indictment adequately alleged a federal crime, the claimed lack of sufficient detail in the indictment likewise is beyond the scope of §2255 proceeding." *Schmidt v. United States,* 5 Cir. 1961, 286 F.2d 11, 12.

Even more recently our Court affirmed a conviction despite a chronological error in the defendant's indictment and stated broadly:

> "As to prosecutions in the United States Courts, we think appellant's contentions were settled by the Supreme Court as far back as 1898. In *Ledbetter v. United States,* 170 U.S. 606, 612, 18 S.Ct. 774, 42 L.Ed. 1162, the Court said,
> 'Neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any date before the finding of the indictment, and within the statute of limitations will be sufficient.' (other cases cited)." *Owen v. United States,* 5 Cir. 1967, No. 24,595.

See also *United States v. Crowder,* 6 Cir. 1964, 346, F.2d 1, where the Sixth Circuit affirmed a federal conviction even though the prosecution could not show that any of the twelve money orders alleged in the indictment as stolen were present among the 235 money orders introduced into evidence. Besides applying the two judicial tests of surprise and double jeopardy, the Court found additional authority in Fed. R. Crim. P. 52 (a), the "harmless error rule."[5]

Constitutional strictures on state criminal procedure should not be more rigorous than on the federal govern-

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5. (a). Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

ment in the application of its criminal law. We cannot support a double standard. Nees' indictment was not a decoy, and we cannot grant habeas corpus relief on the variance which he claims.

(b) *Double Jeopardy.* In *Ellis v. State,* Tex. Crim. App. 1958, 167 Tex. Cr. R. 88, 318 S.W.2d 655, which we have quoted supra, the Texas Court of Criminal Appeals reversed a conviction for misappropriation of public funds because of a previous acquittal for the same offense. The State claimed that it was relying on different evidence, but the Court answered with the following statement:

> "There was evidence introduced by the state in (the second case) that had been theretofore introduced in (the first case) which was sufficient to sustain a conviction in (the first case) and could have been used by the jury as a basis for either or both verdicts in said causes. Therefore, the former judgment of acquittal operates as a bar to the prosecution and conviction in this cause." 318 S.W.2d at 658.

A careful reading of the Ellis opinion assures us that Nees will not be convicted at a future trial in which the same evidence is advanced. Morover, the opinion even implies that Nees is protected from a conviction on any evidence of misappropriation between November, 1958, and November, 1961, regardless of whether it was actually advanced at his trial. See also *Rogers v. State,* 1960, 169 Tex. Cr. R. 239, 333 S.W.2d 383, 384; *Hobbs v. State,* 1962, 171 Tex. Cr. R. 607, 352 S.W.2d 836, 837. Certainly Nees cannot claim harm in this regard.

We do not hold here that if a variance follows traditional Texas practice, it can never be so prejudicial as

to affect constitutional rights of a defendant. There is a time for exactitude as well as a time for tolerance in the precising of a crime. In fact, the Texas Court of Criminal Appeals itself has reversed convictions when variances between indictment and proof were substantial. *Zybura v. State,* Tex. Crim. App. 1967, 420 S.W.2d 954, and cases cited therein, ("material variance between the pleading and the proof as to the date of the prior misdemeanor conviction"); *Hodge v. State,* 1957, 164 Tex. Cr. R. 69, 297 S.W.2d 138 (at (1)). However, our concern is not for rigid formalism, but rather for trials in which defendants are aware of the nature of their accusations. We find such awareness in Nees' trial.

II.

Nees' second contention involves the admission of a confession which he gave to an investigator before he was advised of his right to counsel. The trial court found that Nees came under suspicion when he informed an associate, J. M. Gowling, that he was short of funds to the extent of $15,000.00 or more. Gowling immediately reported this to the sheriff, and Nees was taken to the District Attorney's office where he was questioned by a special investigator. While there, Nees was warned that any statement he might make would be used against him and that he did not have to make any statement if he chose not to do so. He was not advised of his right to counsel. Nees, however, did allow his statement to be recorded and later signed a written copy. The trial court further found, after a separate hearing outside the presence of the jury, that Nees had been working in the sheriff's office about fourteen years and was aware of his consti-

tutional rights, and that no coercion, promise, or other inducement was used to obtain the confession.

This case was tried before the Supreme Court's decision in *Miranda v. Arizona,* 1966, 384 U.S. 436, 86 S.Ct. 1692, 16 L.Ed.2d 694, 10 ALR 3d 974. We find that Nees's rights under *Escobedo v. Illinois,* 1964, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, were not violated, and, under *Johnson v. New Jersey,* 1966, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882, his *Miranda* rights cannot be retroactivated.

AFFIRMED.

BROWN, Chief Judge, concurring and dissenting in part:

I concur fully in Part II and so very, very much in Part I. But in the final analysis my difference as to Part I would call for reversal so I dissent to that extent.

What I do not disagree with sharpens my difference. Thus, I agree there is no ground to claim denial of due process from the standpoint of double jeopardy. The Texas law[1] on that is extremely liberal and would afford the petitioner full protection as to every item and transaction making up the 15 to 20 thousand dollar diversions. Similarly, proof of other like activities to show motive, design, plan, scheme and the like exposes this sort of defendant to blunderbuss proof which, despite the law's rationalization, undoubtedly poisons the mind of the jury on the isolated, charged incident.[2] As Judge Goldberg so graphically portrays, the practical necessity for this sort

1. See *Ellis v. State* and related in the Court's opinion.

2. See *Weiss v. United States* and appended text in the Court's opinion.

of proof is augmented in situations of running embezzlement. The more sophisticated it is, with offsetting false entries which all have to be kited, proof of the crime must frequently have its alpha and end in its omega. In between may be, as there was here, evidence concerning 15 to 20 thousand dollars to establish a $312.35 diversion. Nor am I opposed to the general proposition recognized by Federal Law[3] and by the Texas Code[4] that "on or about" may encompass an act committed prior to the indictment but within the period of the statute of limitations. All of these developments are just part of the hazards of the trade of embezzlement or misapplication of public funds. It is risky business, and ought to be.

But this is not what concerns me. Here is a charge that has that rare precision which only figures permit. The charge is for the misapplication of $312.35, no more, no less. There is no charge of misapplication of 15 to 20 thousand dollars. Granted that virtually a 3-year period of time is allowed in which to show the misapplication of $312.35, the trial court did not limit it to that.

To be sure, in the early part of the State Court's charge the jury was required to find, beyond a reasonable doubt, that the defendant did misapply "all or some part of *said* $312.35 in money alleged in the indictment."[5]

But this simplicity which showed a matching of the indictment charge, the proof and any verdict of guilty was soon obliterated. I say obliterated because the acceptable and understandable "on or before" rule of Art. 21.02 was

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3. See *Owen v. United States* and appended text in the Court's opinion.

4. See Art. 2102 and text in the Court's opinion.

5. See the Court's opinion at _____.

expanded somehow into allowing the jury to find the defendant guilty if, any time in the 3-year period preceding the indictment, the defendant had misapplied so much as a single red cent![6]

I can assume that a state statute could define constitutionally a crime of misapplication of *any* sum of money under any circumstances within the 3-year period of the statute of limitation. That would at least supply fair notice to (a) nascent misappliers who want to know their "rights" before doing any till-dipping and, more likely, (b) those caught and charged. But here the statute defining the crime has no such broad reach. Nor is it changed by the "on or before" latitude of Art. 21.02. That pertains to time of the event, not a multiplicity of events.

The simple fact is that nobody _____ I mean no, no, nobody, a lawyer, party or Judge of this or any other Court, high or low _____ could take this record and with the most "perceptive antennae" *Morgan v. United States,* 5 Cir., 1968, 399 F.2d 93; *Tillman v. United States,* 5 Cir., 1969, _____ F.2d _____, _____ (No. 25381, Jan. 9, 1969 slip opinion at 11) ever penetrate the enigmatic riddle of the mystery wrapped verdict of guilty

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6. The Court's opinion sets it out but it bears repeating,
"You are instructed that, as a part of the law of this case, the State is not under the burden of establishing that the specific sum of $312.35, as alleged in the indictment, was unlawfully and fraudulently taken by the Defendant and converted to his own use, it being, on the contrary sufficient under the law if the State has established, from the evidence, beyond a reasonable doubt, that *any sum of money* was unlawfully and fraudulently taken by the Defendant and converted to his own use on or about the 31st day of July, 1959, as the term 'on or about said date,' as applied to this case, is construed as thereinabove set forth. (set forth as *any time* from November 28, 1958) the date the statute of limitations tolled the time) through November 27, 1961 (the date the grand jury returned the indictment)." (Emphasis added.)

to ascertain the jury's determination as to what money was taken, the *amount* of that money or *when* it was taken. One thing we know. The $312.35 was quite unimportant. What convicted the petitioner might have been a single dollar six months before that alleged event, or $10,000 2 years later.

Thus, by a simple, but now deceptively tragic charge of a specific sum at a specific time, the defendant finds after the fact, that he was obliged to defend against a charge of misapplying *any sum* at *any* time over a 3-year period.

We may come to legislative definition of crimes of such latitude,[7] but until we do I do not think due process permits the exposure of a citizen to these unknown, unascertainable, indefinable risks, certainly not out of statutory construction or procedural rules, legislative or judge made.

Given counsel of the greatest skill and a trial before the fairest jury, presided over by the most meticulous Judge, the beginning is nevertheless a mystery. It is not until the trial is over that the defendant knows *what* he is charged with doing or *when* it took place.

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7. Such a statute would be a shocker. It would read like this: "If any officer of any county, city, or town, or any person employed by such officer shall fraudulently take, misapply, or convert to his own use *any* money, that *may* have come into his custody or possession by virtue of his office *at any time within three years prior to the date such person is indicted,* he shall be confined in the penitentiary not less than two nor more than ten years."

An indictment drawn under such a statute would likewise be repulsive abhorrent, despicable, dreadful, withering, and astounding. It would go like this: "It is hereby charged that Raymond Roe, being an officer of this county, did, *within three years prior to the date of this indictment* fraudulently misapply *some sum of money belonging to this county,* against the peace and dignity of the State."

For a man to know at the end, but not before, what he has been tried for and what has happened to him, simply does not square with ideas of fairness, fair play, and much less, constitutionally mandated due process.

I therefore respectfully dissent.

APPENDIX F

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 24400

ROBERT P. NEES,

Appellant,

versus

R. E. CULBERTSON, Sheriff,

Appellee.

Appeal from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(March 24, 1969)

Before BROWN, Chief Judge, and WISDOM and GOLDBERG, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX G

1. "In all criminal prosecutions, the accused shall enjoy the right . . . . to be informed of the nature and cause of the accusation; . . . ." U.S. Constitution, Amendment VI.

". . . . nor shall any state deprive any person of life, liberty, or property without due process of law; . . . ." U.S. Constitution, Amendment XIV (pertinent portion).

2. The Statutes and Rules which this case involves are:

"Art. 95. MISAPPLICATION OF COUNTY OF CITY FUNDS:

If any officer of any county, city or town, or any person employed by such officer, shall fraudulently take, misapply, or convert to his own use any money, property or other thing of value belonging to such county, city or town, that may have come into his custody or possession by virtue of his office or employment or shall secret (sic) the same with intent to take, misapply or convert it to his own use, or shall pay or deliver the same to any person knowing that he is not entitled to receive it, he shall be confined in the penitentiary not less than two nor more than ten years." Art. 95, Vernon's Annotated Penal Code of Texas.

3. "An indictment shall be deemed sufficient if it has the following requisites: . . . . The time mentioned must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation. . . . ." Vernon's Annotated Code of Criminal Procedure 1925, Art 396, Section 6, now Art. 21.02, Section 6.